United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21188

HAROLD S. CLOSE

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal From An Order Of The United States District Court
For The District Of Columbia Dismissing The Complaint

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QUESTIONS PRESENTED

1. The question is whether or not the United States District Court has jurisdiction under the Federal Tort Claims Act in a civil action filed against the United States of America by a federal prisoner temporarily incarcerated in the District of Columbia jail claiming negligence on the part of the United States and prison officials in failing to provide for his safekeeping.

JURISDICTIONAL STATEMENT

This is an appeal from an order dismissing a complaint filed in the United States District Court for the District of Columbia pursuant to the Federal Tort Claims Act, 60 Stat. 812, U.S.C. Title 28, § 1346(b), alleging negligence against the defendant, United States of America. The jurisdiction of this court is conferred by 62 Stat. 929, U.S.C. Title 28, § 1291.

STATEMENT OF THE CASE

The plaintiff is a federal prisoner, presently incarcerated in the United States Medical Center for federal prisoners in Springfield, Missouri. He was convicted on February 28, 1964 in the United States District Court for Maryland in Baltimore, Maryland, of bank robbery, a federal offense. 62 Stat. 796, U.S.C. Title 18, § 2113. He was sentenced by that court to fifteen years imprisonment. As is customary the sentencing order committed the plaintiff "to the custody of the Attorney General of the United States or his authorized representative." The plaintiff filed his notice of appeal and appealed the conviction.

See Close v. United States, 349 F.2d 841 (4th Cir. 1965). On March 6, 1964, the plaintiff was incarcerated in the District of Columbia jail to await final disposition of his appeal.

On or about December 5, 1964, the plaintiff fell down a flight of stairs in the District of Columbia jail when the sole of his shoe caught the edge of the step and threw him forward. Plaintiff in his complaint alleges in the broad terms suggested by the Federal Rules of Civil Procedure (Rule 8; see Form 9, Appendix to Federal Rules of Civil Procedure) that this fall was caused by the negligence of the United States and the District of Columbia jail officials. Specifically, his claim is based upon the failure of those persons responsible for his safekeeping, care and custody as a federal prisoner to provide him with safe shoes. Despite the plaintiff's repeated requests that his shoes be repaired or replaced, the plaintiff was compelled to wear a shoe with a sole attached only at the rear portion. This "flapping" sole caused his fall which resulted in injuries to his spine. At the present time, the plaintiff is paralyzed below the waist and confined to a wheel chair.

The plaintiff filed his complaint on November 14, 1966, alleging, as stated above, negligence against the United States and the District of Columbia for failure to provide him with proper care, custody and safekeeping. Jurisdiction over the United States was predicated upon the Federal Tort Claims Act, 28 U.S.C.A. 1346(b). Jurisdiction over the District of Columbia was based upon 19 Stat. 253, District of Columbia Code, Title 11, § 306 (1961).

Both defendants filed motions to dismiss which were granted. The District of Columbia's motion was based upon plaintiff's alleged failure to give notice in compliance with District of Columbia Code, Title 12 § 309 (1961 ed., Supp. V) and the sovereign immunity of the District of Columbia against negligence suits involving its discretionary functions, i.e., the maintenance and operation of a penal institution. No appeal was taken from this dismissal.

The United States' motion was based upon an alleged lack of jurisdiction under the Federal Tort Claims Act for the reason that the District of Columbia jail was an agency of the District of Columbia and not the federal government. Hence, urged the United States, the alleged negligence of the employees of the District of Columbia jail could not be imputed to the United States for purposes of the Federal Tort Claims Act. This motion was granted by order dated May 4, 1967. No findings or reasons were given for granting the motion. The plaintiff filed his notice of appeal from the dismissal order as to the United States on July 3, 1967.

STATUTES INVOLVED

The statutes involved appear in the appendix to this brief.

SUMMARY OF ARGUMENT

The plaintiff is a federal prisoner, having been convicted of the federal crime of bank robbery (18 U.S.C. § 2113), and sentenced to fifteen years imprisonment by the United States District Court for the District of Maryland. Congress has declared that "a person convicted

of an offense against the United States shall be committed. . .to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served." 18 U.S.C. § 4082, as amended (1965).

Congress has also declared that the "Bureau of Prisons, under the direction of the Attorney General, shall. . .provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042.

The gist of plaintiff's complaint is that the United States, acting through the Attorney General and the Bureau of Prisons, breached the statutory and non-delegable duty to provide for his safekeeping in that he was incarcerated in the District of Columbia penal institution which failed to furnish him with safe shoes and refused to repair or replace his defective shoes which caused him permanent injury.

It is the plaintiff's position that jurisdiction over his claim is vested in the United States District Court by virtue of the Federal Tort Claims Act. That statute allows civil actions against the United States for money damages for personal injury "caused by the negligent act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States if a private person, would be liable to the claimant . . ." 28 U.S.C.A. 1346(b). The Supreme Court has held that a federal prisoner in a federal prison has standing to sue under the Act for injuries caused by the negligence of the prison officials. United

States v. Muniz, 374 U. S. 150 (1963). The statute is applicable to this case wherein the federal prisoner, incarcerated temporarily in the District of Columbia jail, was injured as a result of (1) the failure of the Director of the Bureau of Prisons to incarcerate the plaintiff in an institution which provided for his safekeeping, and (2) the failure of the employees of the District of Columbia jail to provide the plaintiff with suitable shoes for his safekeeping.

STATEMENT OF POINTS

1. The court below erred in dismissing the complaint because the United States District Court for the District of Columbia has jurisdiction, under the Federal Tort Claims Act, over a negligence claim by a federal prisoner for injuries caused by the failure of the United States to provide suitable quarters and failure to provide for his safekeeping, care and subsistence.

ARGUMENT

1. The Federal Tort Claims Act Confers Jurisdiction Upon The United States District Court In A Civil Action By A Federal Prisoner Alleging That The United States Failed To Provide Him With Suitable Quarters For His Safekeeping.

It is now settled law that a federal prisoner, such as the plaintiff, is entitled under the Federal Tort Claims Act to bring an action against the United States for personal injuries suffered as a result of the negligence of the Federal Government in providing living quarters and care for that prisoner. United States v. Muniz, 374 U. S. 150 (1963).

In Muniz, the court reviewed two claims by two federal prisoners incarcerated in federal penal institutions. Prisoner Muniz was injured when twelve fellow inmates attacked and injured him. He alleged that the prison officials were negligent in failing to provide enough guards to prevent the assaults and in placing him in proximity to mentally abnormal prisoners without adequate supervision. Prisoner Winston's suit alleged that he was blinded by reason of the negligence of the prison employees in diagnosing and removing a brain tumor.

The court carefully reviewed the legislative history of the Federal Tort Claims Act and concluded in a unanimous opinion that a federal prisoner could sue under the Act to recover damages from the United States Government for personal injuries sustained during confinement by reason of the negligence of federal prison officials. In its opinion the court held that 'the duty of care owed by the Bureau of Prisons 'was to provide each federal prisoner with "suitable quarters and provide for [his] safekeeping, care and subsistence. . .", and that this duty was fixed by 18 U.S.C. § 4042. Id at 165.

To carry out this duty, Congress gave the Attorney General the authority to incarcerate federal prisoners in federal penal institutions (18 U.S.C. § 4001), or in non-federal institutions (18 U.S.C. § 4002). The latter section specifically provides that the Director of the Bureau of Prisons may commit federal prisoners to non-federal penal institutions for "the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress. . ." Thus, regardless whether the Attorney General

or his representative incarcerated the plaintiff in a federal or non-federal penal institution, the duty of the United States to provide suitable quarters for his care, safekeeping and subsistence remained fixed, constant and non-delegable. See Prosser, Torts 483 (3rd ed. 1964).

In this case, the plaintiff's complaint is predicated in part upon the failure of the Bureau of Prisons, an agency of the federal government, to incarcerate him in an institution which provided suitable quarters and for his safekeeping. In Muniz, the Supreme Court held that the federal government's failure to provide Muniz with the safekeeping required by 18 U.S.C.§4042 constituted negligence for which an action under the Federal Tort Claims Act would lie. In this case the same situation prevails. The plaintiff was placed by the federal government in an institution which failed to provide him suitable quarters and the safekeeping required by 18 U.S.C.§4042. It was, therefore, error for the lower court to dismiss the complaint for lack of jurisdiction.

2. District of Columbia Jail Officials Were Employees of The United States Within The Purview of The Federal Tort Claims Act.

Under the Federal Tort Claims Act, the United States is liable for the negligent act or omission "of any employee of the Government. . . under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 18 U.S.C. § 1346(b). In 28 U.S.C. § 2671, the term "Employee of the government" as used in § 1346(b), is

said to include "officers or employees of any federal agency. . .and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." (Emphasis added.) In that same section, as amended, 28 U.S.C.A. § 2671 (1966 Supp), federal agency is defined, in pertinent part, as including ". . .the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

It is the plaintiff's position in this case that the District of Columbia jail and its employees were clearly "persons acting on behalf of a federal agency in an official capacity, temporarily. . .in the service of the United States. . ." within the meaning of 18 U.S.C. § 2671. As already pointed out in the Statement of the Case, the plaintiff was a federal prisoner, convicted in a Federal court in Maryland of a federal offense. Following imposition of his sentence, he was placed in the custody of the Attorney General who, acting through the Federal Bureau of Prisons, placed the plaintiff in the District of Columbia jail temporarily until his appeal was decided.[2/] There can be no doubt

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2/ Answer No. 6 by the District of Columbia to plaintiff's interrogatories establishes that the plaintiff was not incarcerated in the District of Columbia jail under contract pursuant to 18 U.S.C. 4002. Thus the exclusion of a "contractor" from the definition of "Federal agency" in § 2671 does not apply.

that the Bureau of Prisons is a federal agency as that term is defined by 28 U.S.C.A. §2671. It is equally clear that the District of Columbia jail and its officials were persons acting on behalf of the Bureau of Prisons in an official capacity when they undertook to incarcerate the plaintiff while he awaited disposition of his appeal. This being the case, the statutory definition of employee of the government is met by the factual circumstances of this case.

The case directly supporting the above stated proposition is Reid v. Covert, 351 U. S. 487 (1955). In that case, Clarice Covert was convicted and sentenced to life imprisonment by a military court-martial for the murder of her husband, an Air Force sergeant. The conviction was set aside by the United States Court of Military Appeals, and she was transferred from a federal penal institution to the District of Columbia jail to await a rehearing. While in the District of Columbia jail, she filed a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that the statute which permitted her trial by court martial was unconstitutional. The District Court granted the writ and on direct appeal to the Supreme Court, the appellee, Mrs. Covert, argued that the Supreme Court did not have jurisdiction to hear the direct appeal under 28 U.S.C. § 1252, because that statute applied only to suits in which "the United States or any of its agencies, or any officer or employee thereof. . .is a party." It was the appellee's position that the appellant, as the Superintendent of the District of Columbia jail, was not an officer or employee of the United States for purposes of 28 U.S.C. § 1252. The Supreme Court disagreed and held that the District of Columbia jail was, insofar as

federal prisoners incarcerated there were concerned, a jail of the United States (351 U. S. at 489-90):

> "The Superintendent [of the District of Columbia jail] is responsible for the Director of the Department of Corrections of the District of Columbia who in turn is selected by the Board of Commissioners of the District. Reorganization Order No. 34, D. C. Code, 1951, App. to Title 1, Supp. III, p. 34. The Commissioners are appointed by the President and are officers of the United States under Art. 2, § 2, of the Constitution. The Superintendent has a statutory duty to 'receive and keep in the Washington Asylum and Jail all prisoners committed thereto for offenses against the United states.' D. C. Code, 1951, § 24-410. Mrs. Covert was placed in the District jail on orders of the Air Force because there were no accommodations for women prisoners at Bolling Air Force Base, where the rehearing of her trial by court martial is scheduled.
>
> It has long been settled that an officer, while holding prisoners for the United States is the "keeper of the United States," Randolph v. Donaldson (U. S. 9 Cranch 76, 86, 3 L ed. 662, 665, and as such, is an officer of the United States. Since appellant was required to receive and keep prisoners of the United States, he is, to that extent, an officer of the United States. It is not necessary to say and we do not say, that the District of Columbia in these circumstances is an "agency" of the United States. For, whether the Government should maintain its own jail in the District of Columbia or utilize the local facilities, is simply a matter of administrative convenience, and it would do violence to the purpose of Congress to provide a "prompt review of the constitutionality of federal acts," (citation omitted) to interpret § 1252 restrictively. For all practical purposes, the District of Columbia jail is, in this case, the jail of the United States," (citation omitted) and the superintendent is its keeper. As the custodian of Mrs. Covert, a federal prisoner, appellant is an officer of the United States for purposes of § 1252. (Emphasis added.)

Although the present case, unlike Covert, does not involve 28 U.S.C. § 1252, the resolution of the jurisdictional question in each case hinges upon whether or not the District of Columbia jail was a

federal agency and its employees officers of the United States vis-a-vis the federal prisoner incarcerated there. In Covert, the Court refused to interpret restrictively the words federal "employee," "agency" and "officer" lest it violate Congress' intent to provide prompt review of the constitutionality of federal acts. This same rationale should apply even more strongly in this case because a narrow interpretation of the same words here will have far more serious consequences than in Reid v. Covert, supra. The restrictive meaning of federal agency or employee in Covert would not have extinguished Mrs. Covert's rights to appellate review. It simply would have meant that review be sought first in the United States Circuit Court of Appeals. But in this case, a restrictive interpretation of the words "employee of the government" will forever bar the plaintiff from the governmental resources reserved to compensate him fully for his tragic injuries. As already noted, the anarchronistic principle that the "king can do no wrong," as well as the technical prerequisites of a notice statute, D. C. Code, Title 12 § 309, have foreclosed the plaintiff from relief against the District of Columbia. If the Federal Tort Claims Act definition of federal employee is construed restrictively, the plaintiff will be without recourse against those governmental agencies which controlled every aspect of his life when he was injured.

To interpret narrowly the terms in question would also do violence to the intention of Congress in enacting the Federal Tort Claims Act. That statute excepts certain types of governmental activity, e.g., intentional torts and negligence in discretionary functions. 28 U.S.C. § 2680. However, none of the circumstances excepted includes

claims by federal prisoners injured while incarcerated. As the Supreme Court declared in United States v. Muniz, 374 U. S. 150 at 165-66:

> "The Federal Tort Claims Act provided much needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity[3/], narrow the remedies provided by Congress. As we said in Ragonier, Inc. v. United States, supra (352 U. S. at 320), 'There is no justification for this court to read exemptions into the Act beyond those provided by Congress'." (Footnotes omitted.)

Thus, to give a limited meaning to the words federal employee as they are used in the Federal Tort Claims Act would not only fly in the face of Congressional intent to ameliorate the harsh consequences of sovereign immunity, but also would ignore the Supreme Court's language in Muniz favoring a non-restrictive approach to claims by federal prisoners under the Act.[4/]

In addition to Reid v. Covert, supra, there is other authority for the proposition that state or non-federal jailers are officers and agents of the federal government when called upon to incarcerate federal prisoners. In United States v. Hoffman, 13 F.2d 269, aff'd 12 F.2d 278

3/ The court noted with approval those states which had relaxed the rule of sovereign immunity. 374 U. S. at 156-67, footnote 11.

4/ Legislative intent to expand rather than limit the rights of federal prisoners who are injured can also be found in its amendment to 18 U.S.C. § 4126, the "workmen's compensation" statute for federal prisoners. Under the amendment the rights of federal prisoners to compensation for work-connected injuries were substantially enlarged. See United States v. Muniz, supra at 160, footnote 17.

(7th Cir., 1926), the defendants were convicted in federal court and sentenced to one year imprisonment to be served in a Cook County jail. The state jail officials were held in contempt of the commitment order for periodically releasing the defendants from jail. The court described the relationship between the United States and the penal officials of the state in these terms. (13 F.2d at 28):

> "The United States, by this arrangement with the State of Illinois, has the lawful right to the use of the jails of the several counties of Illinois in which to confine prisoners committed by authority of the United States. It is the duty of the sheriff, superintendent, and other deputies to receive and detain in the jail such prisoners until their terms of imprisonment expire, or they are otherwise discharged from the prison by the authority of the United States. The state jail is to be deemed the jail of the United States for this purpose. The keeper of the jail is the keeper of the United States. Those charged with responsibility for the execution of the writs of the United States court are to that extent and for that purpose officers of the United States court, and are subject to punishment for contempt for disobedience or disregard of the warrants or orders committing such prisoners to their custody."

See also, Ex parte Shores, 195 F. 527 (D. C. Iowa 1912); In re Birdsong, 39 F. 599 (D. C. Ga. 1889).

A case directly in point and one which the Supreme Court cited with approval in United States v. Muniz, supra at 157 (n. 13) is Paige v. State, 199 N. E. 617 (N. Y. 1936). In Paige the defendant was convicted of a state offense and committed to a privately owned reformatory. While serving her sentence she was injured as a result of the negligence of the employees of that institution for which she brought suit against the State of New York under a state statute similar to the Federal Tort

Claims Act. The court held that the state was liable for the torts of the independent penal institution which caused injury to a New York prisoner (Id. at 618):

> "The quasi penal institution in which the claimant was confined was a governmental agency to which the state had committed in part its function to care for wayward minors. . .But the institution did not thereby acquire a status equivalent to that of the civil divisions of the state. . .There is no misuse of language in saying that the state employed the institution. . .If the word "agent" were found in section 12-a of the Court of Claims Act, would it be held that this case was outside the state's assumption of liability? The terms 'agent' and 'employee' have been used interchangeably in the cases that dealt with state immunity from liability for tort." (Citations omitted.)

Another compelling reason for applying the Federal Tort Claims Act to the plaintiff's claim is the distinctly federal character of the District of Columbia jail with respect to its federal prisoners. As was emphasized in Reid v. Covert, supra, the District of Columbia jail officials are the designated agents of the presidentially appointed Commissioners who, under Art. 2 § 2 of the Constitution, are officers of the United States. In addition, the jail is located within the federal enclave of the District of Columbia and supported financially from funds appropriated by Congress from the United States Treasury. Moreover, its Superintendent has the statutory duty to "receive and keep in the Washington Asylum and Jail all prisoners committed thereto for offenses against the United States." D. C. Code, 1961, § 24-410.

Thus, in a very real sense, the District of Columbia jail is a federal penal institution with respect to those federal prisoners committed to its care and custody. As such, injury to a federal

prisoner, as a result of the negligence of the District of Columbia jail's employees subjects the United States to liability under the Federal Tort Claims Act. See United States v. Muniz, supra. To hold otherwise would serve to deny to federal prisoners incarcerated in the District of Columbia jail what is available to all other federal prisoners, namely, access to the federal courts under the Federal Tort Claims Act for wrongs committed against them by their jailers.

CONCLUSION

For all of the reasons stated above, it is respectfully submitted that the lower court erred in dismissing the complaint against the United States and accordingly it is requested that this court reverse and vacate the dismissal order thereby reinstating the plaintiff's claim against the United States under the Federal Tort Claims Act.

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APPENDIX

The statutes involved in this case are as follows:

The following sections of the Federal Tort Claims Act are applicable.

60 Stat. 812, 28 U.S.C. 1346(b) provides in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts. . .shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

62 Stat. 982 28 U.S.C. § 2671, provides in pertinent part:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term --

> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * * *

* * * * * *

80 Stat. 307, 28 U.S.C.A. 2671 (as amended 1966 Supp.), provides:

> "As used in this chapter and sections 1346(b) and 2401(b) of this title the term 'federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

* * * * * *

62 Stat. 849, 18 U.S.C. 4042 provides in part:

The Bureau of Prisons, under the direction of the Attorney General, shall --

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise.

* * * * * *

62 Stat. 850, as amended, 79 Stat. 574, 18 U.S.C.A. 4082 (1966 Supp.) provides in pertinent part:

> (a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.
>
> (b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

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BRIEF FOR APPELLEE

United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of appellee, the following question is presented:

Whether employees of the District of Columbia Department of Corrections in caring for and supervising federal prisoners committed to the District of Columbia Jail are Federal employees within the meaning of the Federal Tort Claims Act where the Federal Government has no control or supervisory power over such employees.

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*Cases chiefly relied upon are marked by asterisks.

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v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On November 14, 1966, appellant filed a complaint in the District Court for the District of Columbia against the United States [1] asking for damages under the Federal Tort Claims Act for injuries sustained during his incarceration in the District of Columbia Jail.[2]

In support thereof, appellant pleaded the following. On February 18, 1964, he was found guilty of armed robbery under 18 U.S.C. § 2113 by the District Court for the District of Maryland. After having been sentenced to a term of fifteen years imprisonment, appellant was committed to the custody of the Attorney General or his authorized representative. He was

[1] Appellant joined the District of Columbia as co-defendant. The District of Columbia's motion to dismiss on grounds of governmental immunity and failure of appellant to comply with statutory notice requirements was granted by Judge McGarraghy.

[2] We use the term "District of Columbia Jail" when referring to this City's major facility for incarceration instead of that facility's formal name, the "Washington Asylum and Jail". See 24 D.C. Code § 407.

transported to the District of Columbia Jail, 200 18th Street, S.E.. Washington, D.C., where he remained under the care and supervision of its officials until July 26, 1966, when he was transported to the Federal Penitentiary at Springfield, Missouri.

On December 5, 1965, while incarcerated at the District of Columbia Jail and under the supervision of its officials, appellant fell and suffered severe injuries. He alleged his fall and his injuries to be the result of an inability to obtain at the Jail proper footwear to replace the defective shoes he was wearing or to have those defective shoes repaired. Appellant pleaded damages in the amount of $750,000.00.

The United States moved to dismiss on grounds that the Federal Tort Claims Act waived the sovereign immunity of the Federal Government only as to negligent acts of omissions of its agencies or employees. It attached to its motion to dismiss the affidavit of the then Acting Director of the Federal Bureau of Prisons, John C. Taylor, in which he averred that the District of Columbia Jail is not under the jurisdiction of the Federal Bureau of Prisons or the United States Department of Justice but is rather under the aegis of the District of Columbia Department of Corrections, a part of the District of Columbia Government under the then Board of Commissioners. In its memorandum in support of its motion to dismiss, the United States argued that since the District of Columbia is a municipal corporation, the alleged negligent acts and omissions of its employees are not those of a federal agency or employee. Appellant's suit, the United States contended, was therefore not properly brought under the Federal Tort Claims Act and was otherwise unconsented to by the United States and therefore jurisdictionally barred under 18 U.S.C. § 1346(b) and 28 U.S.C. § 2671.

Appellant in his reply took the position that, despite the federal government's lack of supervisory control over the District of Columbia Jail, liability was to be imposed on the United States on the theory that the Director of the Federal Bureau of Prisons had an affirmative statutory duty to provide for the care of all federal prisoners regardless of where incarcerated. Appellant also contended that the District of Columbia Department of Corrections was an instrumentality of the United

States insofar as it was entrusted with his care and supervision. Thus, he argued, employees of the Jail were to be treated as federal employees for the purpose of supervising federal prisoners incarcerated there, and any negligent act or omission they committed was to be imputed to the Director of the Federal Bureau of Prisons and the Attorney General.

By order of May 4, 1967, on the basis of the above pleadings and oral argument of counsel, District Court Judge Joseph McGarraghy granted the Government's motion to dismiss.

It is from that decision that appellant now seeks relief.

STATUTES INVOLVED

Title 28, United States Code, Section 1346(b), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury of loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, Section 2671, provides:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term
>
> "Federal Agency" includes the executive department, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons

> acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

Title 28, United States Code, Section 2674, provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

SUMMARY OF ARGUMENT

The Federal Tort Claims Act renders the United States liable "in the same manner and to the same extent as a private individual" for damages "caused by the negligent or wrongful act or omission of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable." 28 U.S.C. § 2674 and 28 U.S.C. § 1346(b). The Act defines "an employee of government" to include "officers and employees of any federal agency * * * and persons acting on behalf of an agency in an official capacity, temporarily or permanently in the service of the United States, with or without compensation." 28 U.S.C. § 2671.

This Court has repeatedly held that agencies under the authority and control of the District of Columbia Government are not "federal agencies" within the meaning of the Federal Tort Claims Act. The District of Columbia Department of Corrections which has charge of the management and regulation of the District of Columbia Jail is such an agency.

Employees of the District of Columbia Department of Corrections charged with supervising federal prisoners in the District of Columbia Jail are not "persons acting on behalf of a federal agency in an official capacity." The Federal Tort Claims Act does not expand upon common tort principles but renders the United States liable for the negligence of its employee where liability would be imposed under the usual rules of *respondeat superior*. There is not the slightest indicia of a master-servant relationship between the Federal Government and the District of Columbia Department of Corrections in the care of federal prisoners. The Attorney General is simply authorized to commit

prisoners in the District of Columbia Jail and officials of the Jail are authorized and directed to receive and keep such prisoners.

Nor do we think that the United States can be held liable for the Attorney General's mere act of incarceration. The United States has not waived its immunity from tort liability for the lawful acts of its officials absent an allegation of negligence.

And finally, we do not think it aids appellant to assert that the Attorney General has a non-delegable duty to provide him with suitable living quarters. It seems to us unreasonable to assume that Congress would authorize the Attorney General to commit prisoners to an institution, the employees of which, by Congress' determination, are beyond the control of the Attorney General and at the same time impose liability on the United States for the negligent acts of such employees.

ARGUMENT

The District Court had no jurisdiction over the subject matter or the United States and thus properly dismissed appellant's complaint

The Federal Tort Claims Act[3] renders the United States liable "in the same manner and to the same extent as a private individual" for damages "caused by the negligent or wrongful act or omission of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable." 28 U.S.C. § 2674 and 28 U.S.C. § 1346(b). The Act defines "an employee of government" to include "officers and employees of any federal agency * * * and persons acting on behalf of an agency in an official capacity, temporarily or permanently in the service of the United States, with or without compensation." 28 U.S.C. § 2671.

We shall show that appellant alleges in his complaint that his injuries were caused by the negligent acts of a person not a "[Federal] employee" as that term is used in the Federal Tort Claims Act and that appellant seeks to initiate an unconsented suit against the United States, jurisdictionally barred by 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671. Accordingly, we shall demonstrate that the District Court had no jurisdiction over

[3] 28 U.S.C. §§ 2671–2680.

the subject matter or the United States and properly dismissed appellant's complaint as to the United States under Rule 12(b) (1) and (2) of the Federal Rules of Civil Procedure.

a. Employees of the District of Columbia Department of Corrections who are charged with supervising prisoners incarcerated in the District of Columbia Jail are not employees of a federal agency within the meaning of the Federal Tort Claims Act

Section 2671 defines "federal agency" to include "the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." This Court has repeatedly held that agencies under the authority and control of the District of Columbia Government are not "federal agencies" within the meaning of this provision. *Harbin* v. *District of Columbia*, 119 U.S. App. D.C. 31, 33, 336 F. 2d 950, 952 (1964); *Urow* v. *District of Columbia*, 114 U.S. App. D.C. 350, 351 n. 2, 316 F. 2d 351, 352, n. 2, *cert. denied*, 375 U.S. 826 (1963); *Calomeris* v. *District of Columbia*, 96 U.S. App. D.C. 364, 366, 226 F. 2d 266, 268 (1955). To be sure, local agencies nominally under the authority of the District of Columbia but in fact substantially controlled by the Federal Government are "federal agencies" for federal tort claim purposes. See *O'Toole* v. *United States*, 206 F. 2d 912 (3rd Cir. 1953);[4] see also *Goddard* v. *District of Columbia Redevelopment Land Agency*, 109 U.S. App. D.C. 304, 287 F. 2d 343, *cert. denied*, 366 U.S. 910

[4] In *O'Toole*, a member of the District of Columbia National Guard was held to be an employee of the Federal Government within the meaning of the Federal Tort Claims Act. The court in so holding found determinative the great degree of command and control exercised over the Guard and its members by the President, and the corresponding lack of control exercised by local authorities, and the degree to which the District of Columbia National Guard, even in peacetime, was in reality an arm of the Executive. The court specifically noted that the President appointed the Commanding General of the Guard and might remove him at will, a direct chain of command and control existed such that each individual guardsman was subject to the orders of the President, salaries of Guard members were paid by the Department of the Army, and finally, although the District of Columbia Commissioners were empowered to call out the Guard, the President was authorized to determine the size of the force to be used and the manner of the deployment.

(1961).[5] But the District of Columbia Department of Corrections does not fall within this exception. It has charge of the management and regulation of the District of Columbia Jail and is responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed therein. In the performance of these duties, it is subject only to the supervision of the Commissioner.[6] See 24 D.C. Code § 442;[7] see also *Edwards* v. *Sard*, 250 F. Supp. 977 (D.D.C. 1966); *White* v. *Clemmer*, 111 U.S. App. D.C. 145, 295 F. 2d 132 (1961). Thus, the District of Columbia Government exercises total and complete control over the supervision and management of the jail. It is solely responsible for the hiring of Jail employees, the pay which they receive, evaluation of their job performances, manpower and other resourse allotment at the Jail, the dismissal of Jail employees, and the myriad of other circumstances affecting the manner in which employees of the Jail function. Accordingly, insofar as appellant's complaint is predicated on the theory that employees of the District of Columbia Jail are employees of a "federal agency", it fails to state a claim upon which relief may be granted.

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[5] In *Goddard*, this Court indicated that the District of Columbia Redevelopment Land Agency was a federal agency within the meaning of the Federal Tort Claims Act. As in *O'Toole*, the Court found determinative the substantial degree of control over the Agency vested in and exercised by the Federal Government and the corresponding lack of control at the local level. The court noted that the Agency receives direct appropriations from Congress, that it is entitled to hold land in the name of the United States, and that the policy it implements—that of redevelopment of the Nation's Capital—is the announced policy of the United States as stated in 15 U.S.C. § 701.

[6] The District of Columbia is now governed by a single commissioner plus an assistant and a council of nine as provided in Reorganization Plan No. 3, August 11, 1967. This of course in no way alters the substance of the statutory scheme setting out control of the Jail facility at a local level.

[7] 24 D.C. Code § 442 provides in pertinent part:

> Said Department of Corrections under the general direction and supervision of the Commissioners of the District of Columbia shall have charge of the management and regulation of * * * the Washington Asylum and Jail, and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to such institutions. The Department of Corrections with the approval of the Commissioners shall have power to promulgate rules and regulations for the government of such institutions and to establish and conduct industries, farms, and other activities, to classify the inmates and to provide for their proper treatment, care, rehabilitation, and reformation.

b. Employees of the District of Columbia Department of Corrections who are charged with supervising federal prisoners incarcerated in the District of Columbia Jail are not persons acting on behalf of a federal agency in an official capacity within the meaning of the Federal Tort Claims Act

By defining employee of the Federal Government to include "persons acting on behalf of an agency in an official capacity," the Federal Tort Claims Act does not impose liability on the United States for the negligent acts of all persons performing a federal function at the request of a federal official. The Act does not expand upon common law tort principles but simply renders the United States liable "in the same manner and to the same extent as a private individual" for damages "caused by the negligent or wrongful act or omisssion of any employee of the Government * * * under circumstances where the United States, if a private party, would be liable." 28 U.S.C. §§ 1346(b), 2674; see Senate Rept. No. 1400, 79th Cong., 2d Sess., to accompany S. 2177 at 31–32. Thus, in determining whether the United States may be held liable for damages caused by the negligence of persons acting on its behalf, the usual rules of *respondeat superior* apply. See *e.g., Fisher* v. *United States,* 356 F. 2d 706 (6th Cir.), *cert. denied,* 385 U.S. 819 (1966); *United States* v. *Page,* 350 F. 2d 28 (10th Cir. 1965), *cert. denied,* 382 F. 2d 979 (1966); *Buchanan* v. *United States,* 305 F. 2d 738 (8th Cir. 1962); see also *Martarano* v. *United States,* 231 F. Supp. 805. 807–08 (D. Nev. 1964). We do not believe that under these rules the United States may be held accountable in damages for injuries resulting from the negligence of employees of the District of Columbia Jail in the care of federal prisoners. There is not the slightest indicia of a master-servant relationship between the parties. The Attorney General has no control and exercises no supervisory authority over employees of the District of Columbia Jail in the care of federal prisoners. He is simply authorized by statute to commit prisoners there and, conversely, officials of the Jail are authorized and directed to receive and keep such prisoners. 18 U.S.C. § 4082(b); 24 D.C. Code § 410. He is empowered only to prescribe regulations for the Superintendent of the Jail to follow in billing the Federal Government for services rendered by the Jail to federal prisoners. 24 D.C. Code § 421. This is the full extent of his

authorized intrusion into the operation of the Jail and hardly measures up to the degree of control necessary to hold the United States liable for the negligence of its employees.

Appellant argues, however, that the Attorney General and the Bureau of Prisons are charged by statute with the duty to provide him with suitable living quarters [8] and that by incarcerating him in the District of Columbia Jail where he was fitted with allegedly defective shoes, they breached this duty. But, as we noted earlier, the Attorney General is authorized by statute to commit federal prisoners to the District of Columbia jail and the officials there are authorized and directed to receive and keep such prisoners. 18 U.S.C. § 4082(b); 24 D.C. Code § 410. The United States cannot be held liable for the lawful act of one of its officials absent an allegation of negligence in the performance of that act.[9] 28 U.S.C. § 2680(a); see also *Buchanan* v. *United States, supra* at 745. The gravamen of appellant's complaint is not that the Attorney General was negligent in the selection of an institution for appellant's incarceration but that the employees of the institution where he was incarcerated were negligent in their care and supervision of him.[10]

Nor do we think it aids appellant to assert that the Attorney General had a non-delegable duty to provide him with suitable living quarters. We think it is implicit in the statutory scheme that the Attorney General is authorized to delegate this duty. Compare 18 U.S.C. § 4002 which authorizes the Attorney Gen-

[8] 18 U.S.C. § 4042 provides in pertinent part:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> * * * * * *
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States * * *.

[9] Appellant has not alleged any facts applicable to the Attorney General except the act of incarceration.

[10] Even if appellant had alleged negligence on the part of the Attorney General in the selection of the District of Columbia Jail for his incarceration, he would not have stated a basis for recovery under the Federal Tort Claims Act. The selection of penal institutions for the incarceration of federal prisoners is within the Attorney's General's discretion; and as to acts of discretion by its officials, the United States has not waived its immunity from tort liability. 28 U.S.C. § 2680(a); see *Morton* v. *United States*, 97 U.S. App. D.C. 84, 86, 228 F. 2d 431, 432, *cert. denied*, 350 U.S. 975 (1956).

eral, for the purpose of satisfying his duty to provide suitable living quarters for federal prisoners, to contract with states and territories for the imprisonment, subsistence, care, and proper employment of such persons. It seems to us unreasonable to assume that Congress would authorize the Attorney General to commit prisoners to an institution the employees of which, by Congress' determination, are beyond the control of the Attorney General and at the same time impose liability on the United States for the negligent acts of such employees. *Blaber* v. *United States*, 332 F. 2d 629 (2nd Cir. 1964); *Lipka* v. *United States*, 369 F. 2d 288 (2nd Cir. 1966), *cert. denied*, 387 U.S. 935 (1967).

Appellant's reliance on *Reid* v. *Covert*, 351 U.S. 487 (1955) is misplaced. That case involved the construction of 28 U.S.C. § 1252 which authorizes a direct appeal to the United States Supreme Court of decisions invalidating acts of Congress where "the United States * * * or an employee thereof" is a party to the action. The considerations in determining when a direct appeal to the Supreme Court may be taken are wholly different from those involved in determining the liability of the United States for the torts of its employees. In *Reid*, Congress was concerned with providing for the prompt review of the constitutionality of Federal statutes in cases in which a federal statute was struck down. In that setting, the element of Federal control and supervision of allegedly federal employees need be present in only the most perfunctory sense to bring those individuals within the ambit of the definition. We do not read *Reid* to mean Congress for all purposes made a local jail official when custodian of a federal prisoner an "employee of the United States".

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,188

HAROLD S. CLOSE

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal From An Order Of The United States District Court For The District of Columbia Dismissing The Complaint

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UNITED STATES COURT OF APPEALS
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Appellant

v.

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Appellee

ARGUMENT

1. Employees of the District of Columbia Jail Acted on Behalf of a Federal Agency in an Official Capacity Within the Meaning of the Federal Tort Claims Act.

In part "a" of appellee's argument, the government claims that the District Court is without jurisdiction because the District of Columbia Jail is not a federal agency, hence the negligence of its employees cannot be imputed to the United States.

The government's argument disregards the statutory definition of "employee of the government" as that phrase is used in the Federal Tort Claims Act. 28 U.S.C. 1346(b). An "employee of the government" for purposes of the Federal Tort Claims Act includes not only "employees of any federal agency" but also "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States. . ." 28 U.S.C.

§ 2671. Since Congress has seen fit to hold the United States responsible for the negligence of those persons acting on behalf of a federal agency in an official capacity, it is not enough to argue, as does the appellee, that the Federal Tort Claims Act does not apply because the negligent person was not an employee of a federal agency.

The appellant's position is that the District of Columbia Jail officials were acting on behalf of the Attorney General of the United States and the Federal Bureau of Prisons in incarcerating their federal prisoner. Certainly it cannot seriously be disputed that the Department of Justice and the Federal Bureau of Prisons are federal agencies within the meaning of the Federal Tort Claims Act. 26 U.S.C. § 2671. When these agencies chose to have the appellant incarcerated in the District of Columbia Jail while he awaited disposition of his appeal, the jail officials and employees who physically incarcerated him became persons acting on behalf of those agencies in the official capacity of jailers.

It follows, therefore, that appellee's argument that the Act does not apply because the District of Columbia is not a federal agency is misdirected. The appellant herein has never claimed jurisdiction over the District of Columbia by virtue of the Federal Tort Claims Act. Jurisdiction over the District of Columbia is not a subject of this appeal as it was in Harbin v. District of Columbia, 119 U. S. App. 31, 336 F.2d 950 (1964); Urow v. District of Columbia,

114, U. S. App. D. C. 350, 316 F.2d 351 (1963); Calomeris v. District of Columbia, 96 U. S. App. D. C. 364, 226 F.2d 266 (1955), all of which are cited in appellee's brief, p. 6. Hence, those cases are inapplicable to the issue presented in this case.

Equally inapplicable are Edwards v. Sard, 250 F. Supp. 977 (D. C. D. C. 1960) and White v. Clemmer, 111 U. S. App. D. C. 145, 295 F.2d 132 (1961), also cited by appellee. Neither case involved the Federal Tort Claims Act. In Sard, the court simply held that there was insufficient evidence of racial discrimination to warrant judicial interference with the administration of Lorton Reformatory. Similarly in White v. Clemmer, supra, the court held that action in the nature of mandamus was not the proper way to challenge prison administration.

In part "b" of its brief, the appellee does not dispute the appellant's claim that the District of Columbia Jail officials were persons acting on behalf of the United States Department of Justice and the Federal Bureau of Prisons. Although apparently conceding this, the appellee contends that the United States is not liable for the negligence of such officials because there is insufficient control by the United States over the jail officials for the "usual rules of respondeat superior" to apply. First, it should be noted that the usual rules of respondeat superior so as to make the United States liable in the same manner as a private individual do not lend themselves to the situation presented here, namely, the

jailer-prisoner relationship. The appellant is a federal prisoner and pursuant to 18 U.S.C. § 4082(b) every aspect of his life was subjected to the absolute control of the Attorney General. As 18 U.S.C. § 4082(b) provides, the Attorney General may designate any "available, suitable, and appropriate institution or facility. . . and may at any time transfer a person from one place of confinement to another." A measure of this control can be contracted away under 18 U.S.C. § 4002 which allows the United States to contract with non-federal institutions for the incarceration of federal prisoners. Had this been the situation in this case, then appellee's argument and the cases cited in support thereof would have been relevant.

Each of those cases[1/] involves the issue whether an employee of a contractor with the United States was an employee within the meaning of the Federal Tort Claims Act. Under that situation, the usual rules of respondeat superior may apply in determining whether the tortfeasor was an employee of the federal government.

But in this case there is no contract between the United

1/ Fisher v. United States, 356 F.2d 706 (6th Cir.) cert. denied, 385 U. S. 819 (1966); United States v. Page, 350 F.2d 28 (10th Cir. 1965), cert. denied, 382 F.2d 979 (1966); Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962). As noted in Appellant's Brief, p. 8, n. 2, a contractor with the United States is excluded from being a federal agency for purposes of Federal Tort Claims Act liability. 28 U.S.C. § 2671.

States and the District of Columbia so as to bring into play questions of control over the employee which may or may not establish a master-servant relationship. In this case the United States apparently asked the District of Columbia Jail officials to hold the appellant until his appeal was decided (Answer No. 6 of the District of Columbia to plaintiff's interrogatories). No control over the appellant was contracted away by the United States, as could have been done under 18 U.S.C. § 4002. Under that statute, the Attorney General can enter into a contract with the non-federal institution for the care and safekeeping of its prisoner and thereby perhaps insulate itself from liability under the "usual rules of respondeat superior." Instead the United States chose not to relinquish ultimate responsibility for the appellant. It retained the right to transfer him at will.

It necessarily follows that if the District of Columbia Jail officials were subjected to the unfettered control of the United States as to when and on what conditions he would remain with the designated jailers, such officials were likewise subjected to control by the United States over the day-to-day routine of the prisoner. One cannot logically retain ultimate control over the keeper of its prisoner and at the same time deny that it could control that keeper on matters of relatively minor significance. Certainly such an escape should not be available to the United States where the sole objective is to deny that prisoner recourse to a

federal statute available to all federal prisoners. See United States v. Muniz, 374 U. S. 150 (1963).

In State of Maryland v. Manor Real Estate & Trust Co., 175 F.2d 414 (4th Cir. 1949), the United States was held liable under the Federal Tort Claims Act on the theory that the negligent employee, though an agent of an independent firm, was a person acting on behalf of the United States. In that case, the United States acting through the Public Housing Authority engaged a real estate firm (Dugan) to manage property leased to the United States. One of the tenants died as a result of rat infestation and his estate sued, among others, the United States for the negligence of Dugan in failing to maintain the premises in a safe and healthy condition. The United States defended on the theory that Dugan was an independent contractor and beyond its control. The court disagreed and held that the United States retained ultimate supervisory control over Dugan who also agreed to abide by federal regulations for the maintenance of the property. It is submitted that the District of Columbia Jail officials, when subjecting themselves to the ultimate control of the United States as to when and where appellant would be their prisoner, were no less within the control of the United States than was Dugan in the above cited case.

In that same case, the court settled an issue presented by appellant's brief, i.e., that the United States had a non-delegable duty to provide for appellant's safekeeping (Appellant's Brief, p. 7).

In State of Maryland v. Manor Real Estate & Trust Co., supra, at 419, the court held as follows in response to the government argument that it could not be responsible for the negligence of Dugan because its selection of that firm to manage its property was the performance of a discretionary function:

> "The answer to the contention is found in the language of Section 2680 itself because in this case the evidence shows that the government was not charged with a discretionary function or duty, but with the absolute duty of keeping the premises safe for the tenants." (Emphasis added.)

As the court held in United States v. Muniz, 374 U. S. 150 (1963), Congress has imposed the same duty to provide federal prisoners with "suitable quarters and provide for [their] safekeeping, care and subsistence." 18 U.S.C. § 4042. And the court stated in Muniz that this duty was "fixed" independent of an inconsistent state fule. Id. at 165. Thus, the United States cannot escape liability for failure to provide the appellant with suitable quarters either on the theory that its choice of quarters was a discretionary function or the reason that it failed to exercise control over the daily routines of the institution.

CONCLUSION

For the reasons stated above and in the Brief for Appellant, appellant respectfully submits that the lower court erred in dismissing the complaint against the United States. Accordingly, it

is requested that appellant's claim against the appellee be reinstated.

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